No. 20643

In the

United States Court of Appeals

for the Ninth Circuit

GILA RIVER RANCH, INC., a corporation, and RUSSELL BADLEY and CELESTE BADLEY,
Appellants,

vs.

UNITED STATES of AMERICA,
Appellee.

On Appeal from the United States District Court

Appellants' Opening Brief

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JURISDICTIONAL STATEMENT

This is a direct appeal from the Judgment entered on the 16th day of November, 1965, by the United States District Court for the District of Arizona approving the government's application or Motion for Judgment or Remittitur. The underlying action was brought by the United States of America, plaintiff, to condemn a flowage easement over certain tracts of land lying in the County of Maricopa, State of Arizona, and within said District of Arizona. The action is a civil action brought by the United States of America at the request of the Secretary of the Army for the taking of property under power

of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest. The authority for the taking is the Act of Congress approved February 26, 1931, 46 Statutes 1421, U. S. Code 258(a), and the acts supplementary thereto and amendatory thereof, and under the further authority of the Acts of Congress approved April 24, 1888, 25 Statutes 94, 33 U. S. Code 591, and March 1, 1917, 39 Statutes 948, 33 U. S. Code 701, which authorized the acquisition of land for flood control projects; the Acts of Congress approved May 17, 1951, Public Law 81-516 which authorizes the construction of the Painted Rock Dam and Reservoir in the Gila River Basin, Maricopa County, Arizona; and the Act of Congress approved September 2, 1960, Public Law 86-700, which appropriated funds for such purposes. This court's jurisdiction is based upon the Notice of Appeal filed by Russell Badley and Celeste Badley through their attorneys of record, Gust, Rosenfeld & Divelbess, on the 17th day of December, 1965. Said Notice of Appeal is timely. Accordingly this Court's jurisdiction rests upon 28 U. S. Code, Section 1291.

STATEMENT OF FACTS

1. This appeal deals solely with the events and orders accruing subsequent to the jury's verdict. However, a portion of the facts which are vital to this defendant's appeal took place prior to the verdict. They will be set forth. All facts are fully set forth and supported by the Transcript of Record and a Reporter's record of the trial is not a necessary portion of this appeal and is omitted.

2. The instant suit arose as a part of the construction of the Painted Rock Dam located in Maricopa County, Arizona, under the Act of Congress of May 17, 1950 (PL81-516) and of September 2, 1960 (PL86-700), which acts authorized the project and appropriated the fund for construction and con-

demnation. This suit deals with the plaintiff's taking of the flowage easement (See Transcript of Record 1, Page 1, Complaint).

3. Two concurrent actions were filed and later consolidated. They were cause number 3586-Phx. and 4571-Phx., all in the District Court for the State of Arizona. Although consolidated, this appeal deals entirely with the proceedings in Civil 3586, now docketed as case number 20643 U. S. Court of Appeals.

4. The parties to this suit will herein be referred to as follows: UNITED STATES OF AMERICA as plaintiff or government; GILA RIVER RANCH, INC., as Gila; and RUSSELL and CELESTE BADLEY as Badleys or Badley.

5. The facts accruing prior to the verdict are set forth in chronological order:

(1) On July 6, 1961, Badleys and Gila entered into an agreement whereby Gila was *to sell* and Badleys to purchase certain land in Maricopa County, Arizona (See contract at page 71, Transcript of Record).

(2) On March 23, 1961, plaintiff filed its Notice of Taking and its Complaint. A portion of the flowage easement taken lying in Tract No. C-314-E was identical to the description of the land Gila had agreed to sell Badleys.

(3) On December 9, 1961, disbursement of funds paid into the registry of the court under 40 U.S.C.A. 258A were withdrawn by the following parties in the following amounts:

F. A. Gillespie & Sons Co.	489,940.00
Connecticut Mutual Life Insurance Company	100,000.00
O. L. Bane	1,000.00

(See Transcript of Record, Document 39, Proceedings, Page 106)

(4) On July 25, 1962, Gila and Badleys closed the purchase agreement "with the understanding that an equitable

adjustment would be made by Gila to Badleys representing their (Badleys') share of the proceeds of the award." The sale price decided between these parties was to be $136,152.50. See Transcript of Record, Document 21, page 71.

The Badleys were never mentioned in the Complaint (Document No. 1, supra), the Order for Delivery (Transcript of Record, Document No. 2, page 131), or the Notice of Condemnation (Transcript of Record, Document No. 5, page 15), and the record shows that prior to trial the Badleys made no appearance in the action. Appearances, however, were made by Gila, Connecticut Mutual Life Insurance Company, Maricopa County, and Mountain States Telephone and Telegraph (See Transcript of Record, Document 39, pages 104-109) and the record also shows Badleys first entered an appearance on November 18, 1964 (Transcript of Record, Document 39, Proceedings, page 109) after the trial had begun.

Trial on the consolidated cases began on November 16, 1964, the transcript of record shows the first appearance of Badleys on November 18, 1964.

Verdict was rendered by the Jury on November 27, 1964 and judgment thereon dated January 29, 1965, entered February 1, 1965. The verdict was in the sum of $1,132,000.00, interest on the award was added under the Notice of Taking Act 40 U.S.C.A. 258A. The plaintiff filed its motion for new trial on the 8th day of February, 1965, praying for a new trial based upon the allowance of certain evidence offered by Gila.

Plaintiff's motion for new trial dated February 8, 1966, was chiefly based upon the grounds that testimony tendered by Gila River Ranch, Inc. was incompetent. See paragraphs 4, 5, 6 and 7, plaintiff's motion for new trial (Transcript of Record, Document 13, pages 36-38). No part of the motion for new trial is directed to the defendants Badley and there is no evidence that the motion was ever directed to the Badleys.

On May 28, 1965, the court ordered a remittitur in lieu of a new trial. Portions of the Memorandum Decision of May 28th state as follows:

> "Mr. Griffen had no knowledge of farm values in and around Gila Bend, Arizona, . . . His testimony was not permitted on that theory, but the court stated that he stood in the same position as a private owner of property and could testify without prior knowledge of values in view of his official capacity . . . I am now of the opinion Mr. Griffen's testimony was improperly admitted and the instruction error." (citing cases)

The court goes on to say:

> "The jury view does not have the force and effect of informed testimony of experts . . .
> "The verdict should be reduced in cause number 3586 in the amount of $125,000 and in cause number 4571 in the amount of $800. If the defendant landowner within 30 days from filing of this opinion will file a stipulation to accept judgments upon the verdicts in the two cases reduced by the above amount then the motion for new trial will be denied, otherwise the motion will be granted."

Thereafter, remittitur was filed on behalf of Gila *and Badleys* by attorney of record Mark Wilmer. See Transcript of Record, Document 15, pages 43-45. No other parties agreed to or made a remittitur.

Thereafter, plaintiff filed its motion for new judgment on September 10, 1965, requesting **full remittitur from both Gila** and Badleys. A portion of the proposed judgment stated as follows:

> "Since the total amount of $1,250,887.75 has heretofore been deposited into the registry of the court, it is ordered that the defendants Gila River Ranch, Inc. and Russell Badley and Celeste Badley refund into the registry of the court, the amount of $153,125.00 . . ." See Judgment on Remittitur, Transcript of Record, Document 23, page 80.

Badley and Gila filed separate objections to the motion for judgment on remittitur, See Transcript of Record, Document 20, page 55-66 and Document 21, pages 67-73.

On the 16th day of November, 1965, the court entered its order on plaintiff's Motion for Judgment and rendered judgment thereon. A portion of the order states as follows:

> "Defendants Badley object to a judgment against them for the full amount of the refund. From the record and *copy of agreement attached to the memorandum* of counsel for defendant Badley, it is agreed that they received $52,000.00 of the award of $1,132,000 in cause number Civ. 3586-Phx. The payment to them was 4.6% of the principal award and the refund by them should be in the same proportion. I have interlined at the end of the first paragraph on page three of plaintiff's proposed judgment the following:
>
> The joint and several liability of the defendants Badley is limited to $7,043.75 or 4.6% of amount to be refunded."

The judgment on remittitur entered the 16th day of November, 1965, contains the same words as set forth in the order of the 16th of November, 1965, See Transcript of Record, Document 23, at page 80.

Thereafter, Badleys filed notice and perfected their appeal in the regular fashion.

STATEMENT OF THE CASE

This appeal is made by Russell and Celeste Badley, "Appellants," from the Order and Judgment entered on the 16th day of November, 1965, which contained the following order:

> "It is ordered that the defendants Gila River Ranches, Inc., and Russell Badley and wife Celeste Badley refund into the registry of this court the amount of One Hundred Fifty-Three Thousand, One Hundred Twenty-Five and No/100 Dollars ($153,125.00) and

that upon its deposit the Clerk of this Court shall issue a check therefor payable to the Treasurer of the United States Attorney's Office, Phoenix, Arizona. The joint and several liability of the defendants Badley is limited to Seven Thousand, Forty-Three and 75/100 Dollars ($7,043.75) or 4.6% of the amount to be refunded."

The full statement of the position of the appellants, Russell and Celeste Badley, is as follows:

1. That if the said appellants Russell and Celeste Badley are liable to the United States Government by reason of the Order to Remit as above stated, the liability of these appellants has been incorrectly apportioned.

2. That it is the position of these appellants that the Memorandum of Decision of the United States District Court for the District of Arizona made on the 28th day of May, and filed on the 1st day of June, 1965, does not order these appellants to remit any sums whatsoever.

3. That is the position of the appellants Badley that there is no basis for the Order of the United States District Court entered on the 16th day of November, 1965, in which these defendants were ordered to remit the sum of Seven Thousand, Forty-Three and 75/100 Dollars ($7,043.75) to the Clerk of the District Court.

SPECIFICATION OF ERRORS

1. That the court erred in the mathematical calculation of the sum to be remitted by appellants Badley: That at the most said remittance should have been Five Thousand, Seven Hundred Fifty Dollars ($5,750,00) instead of Seven Thousand, Forty-Three and 75/100 Dollars ($7,043.75).

2. That the court erred in the mathematical calculation of the sum to be remitted by appellants Badley: That said remit-

tance should have been $1,579.05 instead of Seven Thousand Forty-Three and 75/100 Dollars ($7,043.75). (This assignment is alternative to Assignment of Error No. 1)

3. That the court erred wherein it ordered the appellants Badley to remit the sum of Seven Thousand, Forty-Three and 75/100 Dollars ($7,043.75) – for these appellants should not be required to remit any sums whatsoever.

QUESTIONS PRESENTED

1. What is the proper mathematical calculation of one condemnee's portion of a remittitur when that condemnee received only a small portion of the award and received no interest on said award?

2. Where the court orders remittitur in lieu of a new trial on a condemnation award and does not specify a certain claimant as one who is to pay a portion of the remittitur and where the primary awardee is clearly named, can court later order remittitur from that person not named in the original order for remittitur?

3. Can one awardee agree to assign a portion of its award to another awardee and if so, can the assignee be subject to remittitur after withdrawing the share assigned?

4. Does a person who agrees to buy land on an executory contract – where the contract is executed prior to the date of the Declaration of Taking (40 U.S.C.A. 258a) but where the sale is not closed until after Declaration of Taking – take his share of the award directly or his share taken *through* the vendor?

SUMMARY

The position of these appellants is as follows:

1. The court incorrectly calculated the amount these appellants are to remit. The basis here is solely one of mathematics. The Badleys received the award of Fifty-Two Thousand Dollars ($52,000.00), which is 4.6% of One Million, One Hundred Thirty-Two Thousand Dollars ($1,132,000.00), but Badleys did not share in the interest. Now on remittitur they should only remit 4.6% of One Hundred Twenty-Five Thousand Dollars ($125,000.00) (the reduced verdict, not considering the interest).

2. That the fairer and better way to consider the Badley's share of remittitur would be to take into consideration the difference between the verdict of One Million, One Hundred Thirty-Two Thousand Dollars ($1,132,000.00) and the final sum of the award ultimately awarded One Million, Ninety-Seven Thousand and No/100 Dollars) ($1,097,000.00) and apportion 4.6% of that as Badleys' share.

3. That there is no basis for the Badleys to remit any sums whatsoever for two good reasons: (1) The court never ordered the Badleys to remit instead of facing a new trial. There were several others who shared in the sums deposited into court along with Gila and Badley, however, that order only referred to one landowner, after first describing the reasons for the remittitur – which were the fact that Gila's president was allowed to testify as to the value of the property. The order never specifically ordered Badleys to remit and cannot be so construed – neither did it order other recipients of the award to remit – and having not been ordered to remit at the first instance a later order to remit must be a nullity. (2) The Badleys were not primary recipients of the award. That is to say, they took their share not directly but through the award and then only by way of separate settlement. As such, Badleys were one

step removed from the award and should not remit – the full remittitur should fall on the primary recipient Gila.

Specifications of Error No. 1

That the court erred in the mathematical calculation of the sum to be remitted by appellants Badley: That at the most said remittance should have been Five Thousand, Seven Hundred Fifty Dollars ($5,750) instead of Seven Thousand, Forty-Three and 75/100 Dollars ($7,043.75).

ARGUMENT

The sole basis of this assignment is that the court erred in the mathematical calculation of the remittitur as far as it affects the appellants Badley. The crux of this assignment is that even if Badleys are liable to remit (which we contest in Assignment No. 3) the amount of the remittitur is incorrect as the court forced Badleys to remit interest they never received.

The agreement wherein Gila and Badleys reached an accord on the share which Badleys received states:

> "The amount of damages for such taking has now been fixed at One Million, One Hundred Thirty-Two Thousand Dollars ($1,132,000)."

And at Paragraph F:

> "The parties have now agreed that Badleys' share of *such* award is $52,000.00 (including the amount previously credited) which amount will be paid to Bradleys and paid by them to Gila to be credited on the Promissory Note of Badleys to Gila as hereinafter set forth." Transcript of Record, Document 21, Page 72) Emphasis Added.

This is the agreement which the parties agreed to divide the award, and is the basis for the court's decision as to the Badley portion. Badleys agree that the relative percentage of 4.6%

constitutes Badleys' relative share of the verdict when no interest is added, however, the order to remit causes Badleys to remit 4.6% of One Hundred Fifty-Three Thousand, One Hundred Twenty-Five Dollars ($153,125.00). The remittance should be 4.6% of One Hundred Twenty-Five Thousand Dollars ($125,000.00) as Badleys never received any of the interest added to the verdict to form the judgment; as such, they should not so remit.

Specifications of Error No. 2

That the court erred in the mathematical calculation of the sum to be remitted by appellants Badley: That said remittance should have been $1,579.05 instead of Seven Thousand Forty-Three and 75/100 Dollars ($7,043.75) (This Assignment is alternative to Assignment of Error No. 1)

ARGUMENT

In this assignment of error the appellant submits that the court erred in its final calculation of the amount of the Badleys' remittitur. This contention is based upon the following:

That the agreement to assign a portion of the award to Badleys was based only on the verdict. That is to say Badleys were to receive an equitable share of the proceeds of the award. However, the Badleys and Gila River Ranch, Inc. agreed the amount of the verdict was to be used as a basis in the contract and the basis of the Badleys' share. The "equitable settlement" was based upon an award of One Million, One Hundred Thirty-Two Thousand Dollars ($1,132,000). Of this sum the Badleys received Fifty-Two Thousand Dollars ($52,000.00) or 4.6%. The final award in the judgment on remittitur comes to the sum of One Million, Ninety-Seven Thousand, Seven Hundred Sixty-Two and 75/100 Dollars ($1,097,762.75). Applying the relative percentage of 4.6 to the difference between the

award upon which the Badleys' share is based and the final award, we come to the following results:

$1,132,000.00	(Basis of Badleys' award)
1,097,762.75	(Final award)
34,237.25	(Difference between verdict and final award)
4.6%	Relative percentage
1,579.05	Remittitur

The basis of this contention is that if there ever was a separate award to the Badleys (and the Badleys for reasons set forth in assignments of errors number 3) vigorously contend that no separate award was ever made to them), the award in the sum of Fifty-Two Thousand Dollars ($52,000.00) did not take into consideration the amount of interest which would also be due on that portion of the full award. The Badleys are entitled to, but never got, this interest. The Notice of Taking Act, Section 40-258(a), U. S. Code, states as follows:

> ". . . Upon the filing said Declaration of Taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said land shall be deemed to be condemned and taken for use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceedings and established by judgment therein and said judgment shall include as part of the just compensation awarded, interest at the rate of 6% per annum on the amount *finally awarded* as the value of the property as of the date of taking, from said date to the date of taking; but interest shall not be allowed on so much thereof as shall have been paid into the court.

No sums so paid into the court shall be charged with the commissions or poundage." Emphasis Added.

Under the original withdrawal the Badleys' share was based only on a percentage of the judgment awarded to them. As such the Badleys were never awarded or never shared in the interest as is contemplated by Section 40-258(a), nor can they now as the funds have been fully paid out of the court registry. Badleys had a right to receive interest on their award. Now that the award has been finally awarded the total amount of the award comes to One Million, Ninety-Seven Thousand, Seven Hundred Sixty-Two and 75/100 Dollars ($1,097,762.75). The court is in effect rewriting the agreement between Gila and Badleys by taking a share of that agreement from Badleys. As such it should make every equitable attempt to pay the Badleys the interest due them and as the interest cannot be paid by award, their portion of the remittitur should be reduced correspondingly. The Badleys should now have to remit only their fragmentary percentage of the difference between the award on which their assignment is based and upon the amount of the final award. The final sum to be remitted should be calculated at 4.6% of Thirty-Four Thousand, Three Hundred Twenty-Seven and 25/100 Dollars ($34,327.25) equalling One Thousand, Five Hundred Seventy-Nine and 5/100 Dollars ($1,579.05).

Specifications of Error No. 3

That the court erred wherein it ordered the appellants Badley to remit the sum of Seven Thousand, Forty-Three and 75/100 Dollars ($7,043.75) — for these appellants should not be required to remit any sums whatsoever.

ARGUMENT

This assignment is based in part upon the contention that the motion for new trial never affected these appellants and the order for remittitur made by the court never ordered these

appellants to remit. The motion for new trial, Transcript of Record Document 13, Pages 36-39, is chiefly based upon the competency of the testimony of Russell Griffen, President of the defendant corporation (Gila River Ranch, Inc.). The court's attention is called to the fact that the government's motion for new trial is based upon testimony of persons testifying for Gila and not for Badleys. The Badleys were never mentioned in the motion for new trial and it is interesting to note that the motion for new trial was not even directed to these appellants. Note the endorsement at page 39:

> "Copy hereof mailed this 8th day of February, 1965, to:
>
> Messrs. Snell and Wilmer
> 400 Security Building
> Phoenix, Arizona 85004
>
> Attorneys for defendants,
> Gila River Ranch, Inc. and the Connecticut Mutual Life Insurance Co.
>
> /s/
> Richard S. Allemann,
> Assistant United States Attorney."

The motion, however, was directed to Connecticut Mutual Life Insurance Company who also took a portion of the award. See Transcript of Record, Doc. 39, Page 106, notation of December 8 and 9, 1961. Thus, the query is: Did the government ever move for a new trial as far as the Badleys were concerned? If so, did the government move for a new trial against Connecticut Mutual Life Insurance Company? In light of the Memo Decision, Document 14, pages 40-42, the answer to both of the above questions must be in the negative. The Memorandum Decision ordering remittitur in lieu of new trial no more relates to the Badleys than it does to Connecticut Mutual or to O. L. Bane or to F. A. Gillespie & Sons Company, all of

whom share in the award along with Gila and Badleys. The order ordering remittitur or in the alternative thereof a new trial states as follows:

> ". . . Defendant's counsel argues that the president of the defendant corporation has been shown to possess knowledge of the farm and farm values and was qualified to state an opinion of value beyond the general qualification of his official capacity . . . Here Mr. Griffen had no knowledge of farm values in and around Gila Bend or in Arizona. His testimony was not permitted on that theory but the court stated that he stood in the same position as a private owner of property and could testify without prior knowledge of values in view of his official capacity."

The Court goes on to say:

> The verdict should be reduced in cause number 3586 in the amount of $125,000 and in cause number 4571 in the amount of $800.00. If the *defendant landowner*, within 30 days from filing of this opinion will file a stipulation to accept judgments on the verdicts in the two cases reduced by the above amounts . . ."
> Emphasis Added

The Memo Decision deals with the testimony of Mr. Russell Griffen, an officer of the defendant Gila River Ranch, Inc. There is no showing that Mr. Griffen in any way affected the jury as to the valuation of the Badley's land if the Badleys' land is separate and apart from the Gila land and there is no mention here of this. The memo opinion relates only to a defendant landowner mentioned in the singular and again one who may file a stipulation in both actions. The Badleys were not a party to cause number 4571, and could not agree to remit $800.00 in that action. However, Connecticut Mutual Life Insurance Company, O. L. Bane and The Gillespie Irrigation Co. were parties to the actions and received a portion of the award, however, they were not mentioned in this order and were never required to remit. It is submitted that the only construc-

tion of the Memo Decision of the 28th of May, 1965, could be to the effect that there was only one "landowner" – Gila River Ranch, Inc. — who was to remit the full sum of the remittitur. The Badleys not being ordered to remit cannot now be held to do so even in light of the remittitur filed jointly by Badleys and Gila River Ranch, Inc. through their then attorney of record, Mr. Mark Wilmer. See Transcript of Record, Document 15, at pages 43-45. As a further portion of this assignment of error it will be noted that it is Appellants' position that it was not a landowner at the time of taking. The agreement between Gila River Ranch, Inc. and Russell and Celeste Badley as shown in Transcript of Record, Document 21, pages 71-73, show that on the 6th day of January, 1961, Gila River Ranch, Inc. and Badleys entered into an agreement for the purchase of certain land. Further that the government's Declaration of Taking was filed on March 23, 1961, and third that the purchase agreement was closed on July 25, 1962, after the notice and declaration of taking had been filed. It is the Badleys position that the person entitled to compensation is the owner of the property at the time of the filing of the declaration of taking. See *United States* vs. *Miller*, 1943, 317 U. S. 369, 63 S.CT 276, 89 L.Ed 336, 147 A.L.R. 55. That all others who claim an interest in that land have their claim converted to a claim against the award to be paid to the landowner and the landowner is the primary recipient subject only to the claims which may exist against the property at the date of taking. See *United States* vs. *Alberts*, 59 Fed. Supp. 298. As such the defendant Badleys were not landowners, as their contract to purchase was not final, just as the purchase was not final in *Alberts*, supra, and not being landowners, were not the parties who were ordered to remit in the court's order of the 28th day of May, 1965.

There is another theory which appellants submit bars the Badley remittitur. This contention is that these appellants were only assignees of a portion of the award, to wit: Fifty-Two Thousand Dollars ($52,000). That this assignment was a por-

tion of a separate agreement made separate and apart from any portion of the instant condemnation action whereby in the sales agreement of July 25, 1962, and in the finalization agreement dated February 13, 1965, the Badleys and Gila River Ranch, Inc. that Gila would "assign to the Badleys" Fifty-Two Thousand Dollars ($52,000) of the award. That as such assignee Badleys took *through* Gila River Ranch, Inc. and not directly from the plaintiff, and that any remittitur that must be taken must be taken from that person who received the original award. Herewith the Badleys were not the primary recipients of the award. The Badleys received Fifty-Two Thousand Dollars ($52,000) as a portion of the side agreement which is separate and apart from any portion of this lawsuit. It is the Badleys' contention that this agreement to assign a portion of the award states what is the applicable law under the circumstances. A quick review of the facts will show that on January 6, 1961, Badleys and Gila River Ranch, Inc. signed an agreement whereby Badleys were to buy a certain portion of Gila's land. Gila remained the owner of the land subject only to the Badleys' claim to purchase it in futuro. The government took the flowage easement, a portion of the land upon which the Badleys were to purchase on March 23, 1961. On July 25, 1962, not having the full land with which it had agreed to sell Badleys (the flowage easement having heretofore been taken and thus removed), Gila and Badleys agreed that the Badleys' claim to the land which had been taken by the government would be shifted and converted into a claim against the award to be awarded on the flow easement. See Recital 3 in the agreement of February 13, 1965, Transcript of Record, Document 21, at page 71, which states as follows:

> "On July 25, 1962, the transaction contemplated between the parties was closed with the understanding the equitable adjustment would be made by Gila in favor of Badleys, representing their share of the proceeds of the condemnation. As a part of the closing

> Badleys executed and delivered to Gila a Promissory Note in the principal sum of $126,152.50 payable in ten equal annual installments commencing July 25, 1963, with interest on the unpaid principal balance at the rate of 6% per annum, payable annually at the same time and in addition thereto. The payments due on July 25, 1963, and July 25, 1964, have been timely made."

After the final verdict had been arrived at by the jury, Badleys and Gila settled all claims on the flowage easement by the contract of February 13, 1965. By this contract the Badleys received an assignment of the Gila claim against the United States Government in the sum of Fifty-Two Thousand Dollars ($52,000), taking the $52,000 and then returned it to Gila and receiving credit therefor. In this effect the Badleys were recompensed by Gila for the loss of the flowage easement which Gila could not deed to Badleys. It is this appellants' contention that all of the law relative to this action is set forth in the case of *United States* vs. *Alberts*, 50 Fed. Supp. 298, wherein the court says at page 299:

> "The determination of the person entitled to compensation must be made as of October 5, 1943, the date of the filing of the declaration of taking. For the reason that compensation is due at the time of taking the owner at that time, not the owner at any earlier or later date, *receives the payment.*" *Danforth* vs. *United States*, 308 U.S. 271, 284, 60 Supreme Court 231, 236, 84 Law. Ed 240. "The award stands in the place of the property." *Washington Water Power* vs. *United States*, 9th Circuit 135 Fed. 541.

At page 300 the court concludes:

> "From the foregoing it will be seen that defendant Holden is entitled to such compensation as may be awarded for this property subject to the taxes, assessment and other liens which may exist against the property on the date of the filing of the declaration of taking."

The award goes to the owner of the property at the date of the declaration of taking, subject to whatever claims any other persons may have against the property. As such in this case the award went directly to Gila River Ranch, Inc. for only Gila River Ranch, Inc. was the owner of the property as of the date of the declaration of taking.

Under the terms of Section 258 (a), Title 40, U.S.C.A., the compensation for the taking of the property shall vest in the "persons entitled thereto" and said compensation shall be ascertained and awarded in said preceeding and established judgment. The judgment in this action merely established the fact that the land was taken and the award made. See Transcript of Record, Document 11, pages 31-33. The judgment contains no specific award to any specific party. The parties may have had the right to have the amount of the award determined by the court under Section 258(a) U.S.C., however, they should also be able to divide the proceeds as they see fit so long as the distribution is not illegal for the parties certainly have the right to make a private agreement in place of the court's apportioning of the award. Badleys stood only as a claimant to a portion of the land. Once the land was taken the Badleys' claim converted into a claim against the fund. The claimant to the land could only have a claim to the final award if the court ultimately awarded that award to the true landowner, in this instance Gila River Ranch, Inc. Had someone else owned the land on March 23, 1961, beside Gila, would Badleys have received a penny from the award? The claimant (Badleys) take only through the landowner and the award goes to the landowner subject to the various claims.

The court appears to have followed this rule for the record shows the payments to Bane, Connecticut Mutual and Gillespie – who must have had some claim to Gila's land – yet the court was inconsistent in ordering Badleys to remit when the other three claimants were not so ordered.

If the court then orders a remittitur after the award has been paid out, a claimant to the fund who took through the landowner should not have to remit unless the remittitur reduces the award to a total value which is less than the claimant's share. In other words, the claimant having taken through the actual awardee he should not in this case have to remit. It should be the sole duty of the actual landowner Gila to make the full amount of the remittance.

The court has ordered the Badleys remittitur to be joint and several with Gila. If the court is in agreement with the position of this appeal, the result will not be to deprive the government of any portion of its remittitur, for Gila will still be liable for the full sum of the remittitur. The final judgment reads:

> "The *joint* and *several* liability of defendants Badley is limited to $7,043.75 or 4.6% of the amount to be refunded." (Transcript of Record Document 23, page 80)

Thus, even if the Badleys prevail, the government's right to remittitur is not impaired for all rights to collect the full sum from Gila will still be in effect.

Respectfully submitted,

GUST, ROSENFELD & DIVELBESS

By FRED H. ROSENFELD

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Twenty copies of the foregoing mailed to the United States District Court this 6th day of May, 1966.

Three copies of the foregoing mailed this 6th day of May, 1966, to:

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Two copies of the foregoing mailed this 6th day of May, 1966, to:

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FRED H. ROSENFELD

I hereby certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals of the 9th Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

FRED H. ROSENFELD